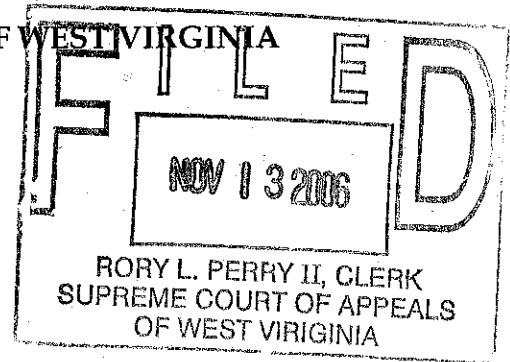


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 060726



STEPHEN J. ANTOLINI, ROGER MCCLANAHAN,  
and MICKEY SYLVESTER,

Petitioners,

v.

WEST VIRGINIA DIVISION OF NATURAL  
RESOURCES,

Respondent.

**BRIEF OF APPELLANT**

Respectfully submitted:

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## MEMORANDUM OF PARTIES

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## KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL

This is an appeal of an adverse and clearly erroneous decision of the Circuit Court of Kanawha County, West Virginia finding that Appellants, Stephen Antolini, Mickey Sylvester and Roger McClanahan (hereinafter Appellants), claims alleging discrimination in pay for Conservation Officers in the Law Enforcement Section, employed by the West Virginia Division of Natural Resources (hereinafter DNR), of equal grade and/or classification, were barred by the doctrine of *res judicata*.

This matter, decided solely on the briefs of the parties, despite appellant's request for oral argument, was dismissed by the Circuit Court below on October 31, 2005. This Petition for Appeal follows.

## II. STATEMENT OF FACTS

Stephen Antolini, Mickey Sylvester and Roger McClanahan filed separate but essentially identical grievances on or about April 9, 2002, alleging discrimination in pay for Conservation Officers in the Law Enforcement Section at the Sergeant rank and seeking salary increases, back pay plus interest, retroactive to August 1, 2002. (See April 9, 2002, Education and State Employees Grievance Board form for state employees).

Appellants were and are currently all classified by the West Virginia Division of Personnel (DOP) as Conservation Officer II's (C02's), in the Division of Natural Resources' (DNR's) Law Enforcement Section. The DNR uses a paramilitary rank structure within its Law Enforcement Section, and C02's hold the rank of Sergeant.

The DOP Classification Specification for Conservation Officer, Sergeant states, in the "Nature of Work" section:

Under limited supervision, is assigned to a geographical area, generally encompassing two or more counties, and is primarily responsible for interpreting and enforcing State Nature Resources Laws, Rules and Regulations provided for in the Code of West Virginia for the purpose of conservation and protection of the natural resources of the state and. [sic] May specialize in a particular program, such as hunter or motorboat safety, and serves as an instructor to the public, as well as, to other officers. Keeps in constant contact with the public in order to carry on a continuous program of education to sporting, civic and community groups and to secure public support of the department's programs.

May supervise subordinate officers with like responsibilities and must apply a personal knowledge of laws and procedures, as well as judgement and tact, in contacts with the public and subordinates.

Sergeant is responsible to Captain and other superior officers for himself/herself and subordinates for enforcement of laws, rules and regulations, submission of reports and records required by regulation or superior officer's request, observance of general and special order, proper performance of duties and maintenance of discipline by officers under his/her command. May, within geographic area of responsibility, assign subordinates to duty whenever and wherever required by the functions, services and needs of the division.

Periodically attends law enforcement and supervisory management schools, as needed and directed. Responds to any call or report of law violation at any hour of the day or night, and, when necessary, leads special patrols within the assigned area. Subject to duty or seasonal, or undercover or other special assignment, whenever and wherever required by the functions, services and needs of the department. Duties involve an element of personal danger due to the nature of law enforcement work. Work requires considerable travel and outside work under varying weather conditions and difficult terrain.

Special assignments and guidelines are given by superior conservation officer, and work is evaluated on the basis of results obtained and compliance with laws, rules, regulations, and policies. Performs related work as required.

The DOP Classification Specification for Conservation Officer, Sergeant states, in the "Distinguishing Characteristics" section:

There are six districts in the Division of Natural Resources. A positioning this class typically has responsibility for several counties within a district, and normally supervises Conservation Officers. There are normally three field sergeant positions in each district. Also, there are normally two additional sergeant positions in each district: one serving as district hunter/boating safety education coordinator and one serving as litter control officer.

As noted above, Appellants are all Field Sergeants serving in different districts.

The DOP divides the State of West Virginia into six districts. Sometime in 2001, DNR added the additional duties of firearms instruction to six of the approximately 24 Field Sergeants employed by DNR. DNR called these six individuals Regional Training Officers (RTO's) and improperly increased their salaries above that of the other Field Sergeants.

The RTO positions were originally posted as Hunter Education Coordinators in 1989. At that time, the positions were ranked as Sergeants and filled a need for someone to teach mandatory hunter education classes, as well as boater education classes.

The RTO position is and was at all times relevant hereto, classified by the DOP as a Conservation Officer II; thus an RTO enjoys the rank of Sergeant within the DNR. Under the DOP's Administrative Rules, there is no difference between the Appellants' position as Field Sergeant and an RTO, particularly as it concerns an employee's rate of pay.

Upon learning that these six RTO's had received an increase (\$1,767.12 per year), Appellants filed a grievance on April 9, 2002, asking that their wages be increased by this same amount, retroactively to August 1, 2002. Importantly, at no time did the Appellants ask that the increased wages of the six RTO's be rescinded.

Pursuant to the DNR's grievance procedures, this matter progressed through Levels I, II, III and IV. On October 28, 2003, following the Level IV hearing, the Administrative Law Judge opined that the DNR's increase in wages for the six RTO's was improper in that there was no difference in the DOP pay grade classification between a Field Sergeant and an RTO and that the Appellants had been treated unfairly. The Appellants had prevailed in their grievance.

While the Appellants prevailed in their grievance, the Administrative Law Judge fashioned a remedy not requested by the Appellants and unauthorized by law in the State of West Virginia. Rather than increase the annual salary of Appellants to bring it in conformity with the six RTOs, the Administrative Law Judge improperly and unlawfully rescinded the pay increases of the RTOs, even though they were not parties to the Appellants' grievance.

As noted above, Appellants were, and are, Fields Sergeants with the DNR, each holding the pay grade of Conservation Officer II, pursuant to the DOP classifications. Appellant Antolini serves in Mercer County, while Appellants Sylvester and McClanahan serve in Summers County and Fayette County, respectively. The DNR's official address in Building 3, Room 669, Charleston, West Virginia 25305 located in Kanawha County, West Virginia. The October 28, 2003, decision of Administrative Law



Judge M. Paul Marteney was rendered and disseminated in, and from, Kanawha County, West Virginia.

On December 11, 2003, the Appellants' appealed the above noted Level IV decision to the Circuit Court of Kanawha County, West Virginia, pursuant to West Virginia Code § 29-6A-7(b) which was the only permissible venue for their appeal.

The Appellants' timely appeal to the Circuit Court of Kanawha County was assigned to the Honorable Paul Zakaib, Jr., and was designated as Civil Action No. 03-AA-193.<sup>1</sup>

Following the Appellants' December 11, 2003, appeal to the Circuit Court of Kanawha County, West Virginia, the Court by letter dated May 9, 2005, set forth the briefing schedule to be followed by DNR and your Appellants. The parties submitted their respective briefs and on October 31, 2005, the Court improperly dismissed Appellants' case holding that their claims are barred by the doctrine of *res judicata*. It is from this Order that Appellants appeal.

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<sup>1</sup> On November 18, 2003, Stephen D. Rexrode, one of the six RTOs who had his wages improperly modified by Administrative Law Judge M. Paul Marteney on October 28, 2003, filed a Petition for Appeal, Affidavit and Motion to Intervene in the Circuit Court of Grant County, West Virginia, designated as Civil Action No. 03-C-68.

On November 26, 2003, Vernon F. Nosse, James W. Vance, David W. Trader and Bobby D. Jones, who were four of the other RTOs similarly affected by the October 28, 2003, decision of Administrative Law Judge Paul Marteney filed substantially identical pleadings in the Circuit Court of Kanawha County, as was designated as Civil Action No. 03-AA-181.

The issues germane to Civil Action No. 03-C-68 in the Circuit Court of Grant County and Civil Action No. 03-AA-181 in the Circuit Court of Kanawha County were whether Administrative Law Judge M. Paul Marteney violated the RTOs' due process rights by rescinding their pay increases without notice, an opportunity to present evidence and most importantly, not even being a party to the April 9, 2002, grievance filed by the Appellants. Further, in that these five individuals were not parties to the Appellants' original grievance, Appellants' intrusion into their civil actions is not permitted under West Virginia law.

### III. ASSIGNMENTS OF ERROR

- A. The trial court erred when it dismissed the Appellants claims of pay discrimination based upon the doctrine of *res judicata*.

### IV. POINTS AND AUTHORITIES RELIED UPON

#### A. STANDARD OF REVIEW.

The Supreme Court of Appeals of West Virginia reviews a circuit court's entry of summary judgment *de novo*. Syllabus Point 1, West Virginia Human Rights Com'n v. Esquire Group, Inc., 618 S.E.2d 463, 465 (W.Va. 2005) (citing Syllabus Point 1, Painter v. Peavy, 451 S.E.2d 755 (W.Va. 1994)). Further,

"A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law."

West Virginia Human Rights Com'n v. Esquire Group, Inc., 618 S.E.2d 463, 465 (W.Va. 2005) (quoting Syllabus Point 3, Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of N.Y., 133 S.E.2d 770 (W.Va. 1963)).

#### B. THE DOCTRINE OF *RES JUDICATA*.

In West Virginia, three elements must be established before a lawsuit will be barred under the doctrine of *res judicata*:

"First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action."

Syllabus Point 3, West Virginia Human Rights Com'n v. Esquire Group, Inc., 618 S.E.2d 463, 465 (W.Va. 2005) (quoting Syl. Pt. 4, Blake v. Charleston Area Medical Center, Inc., 498 S.E.2d 41 (W.Va. 1997)). Further, this Court has recognized the following public policy bases for application of the doctrine of *res judicata*:

We observed in Conley v. Spillers, 171 W.Va. 584, 588, 301 S.E.2d 216, 219 (1983), that "[t]he underlying purpose of the doctrine of *res judicata* was initially to prevent a person from being 'twice vexed for one and the same cause.' State ex rel. Connellsville By-Product Coal Company v. Continental Coal Company, 117 W.Va. 447, 449, 186 S.E. 119, 120 (1936)." We then recognized the following additional public policy reasons underlying the doctrine of *res judicata* as expressed in Montana v. United States, 440 U.S. 147, 153-54, 99 S.Ct. 970, 973-74, 59 L.Ed.2d 210, 217 (1979):

"To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."

Conley, 171 W.Va. at 588, 301 S.E.2d at 219-20.

West Virginia Human Rights Com'n v. Esquire Group, Inc., 618 S.E.2d 463, 469 (W.Va. 2005). As will be discussed more fully below, the trial court clearly erred in dismissing this matter because none of the essential elements are present for application of the doctrine of *res judicata*.

### C. GRIEVANCE PROCEDURE AND APPEAL

West Virginia Code § 29-6A-7. Enforcement and reviewability; costs; good faith.

(a) The decision of the hearing examiner is final upon the parties and is enforceable in circuit court.

(b) Either party or the director of the division of personnel may appeal to the circuit court of Kanawha County or to the circuit court of the county in which the grievance occurred on the grounds that the hearing examiner's decision:

(1) Is contrary to law or a lawfully adopted rule or written policy of the employer;

(2) Exceeds the hearing examiner's statutory authority;

(3) Is the result of fraud or deceit;

(4) Is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

(5) Is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Administrative Rule of the West Virginia Division of Personnel, 143 C.S.R. 1:

Section 22. Grievance Procedure - An employee hired for permanent employment may file a grievance with the Education and State Employees Grievance Board as provided for in W. Va. Code, § 29-6A-1 et seq.

V. DISCUSSION OF LAW

A. THE TRIAL COURT ERRED WHEN IT DISMISSED PETITIONERS' APPEAL BASED UPON THE DOCTRINE OF *RES JUDICATA*

The trial court committed reversible error in dismissing the Appellants/Petitioners' below claims of pay discrimination based upon the doctrine of *res judicata* in that none of the three prerequisite elements for application of this doctrine are present in this case.

1. A final adjudication on the merits in a prior action by a court having jurisdiction of the proceedings.

As noted above, the Appellants' original grievance arose because six of their fellow employees (RTO's) with identical pay grade classifications pursuant to the DOP, were given a salary increase by their employer, the West Virginia Division of Natural Resources. Appellants, in compliance with the State of West Virginia's administrative

rules and procedures for public employees, filed identical grievances asking that their salary be increased in an amount equal to the RTOs. Following the Level IV evidentiary hearing, Appellants filed their appeal in the Circuit Court of Kanawha County.

At no time during the grievance process were the six RTOs made a party to the proceeding, voluntarily or involuntarily. However, after finding that Appellants were in fact being discriminated against, the Administrative Law Judge fashioned a remedy which was both unfair and contrary to law. The Administrative Law Judge unilaterally and improperly rescinded the pay increases of the six RTOs who were not parties to the Appellants' grievance.

West Virginia Code § 29-6A-7(b) which clearly governs the appeal of an administrative law judge's decision, states, in pertinent part, that, "Either party or the director of the division of personnel may appeal to the circuit court of Kanawha County or to the circuit court of the county in which the grievance occurred..." The Appellants were parties to the April 9, 2002, grievance. The six RTOs were not parties to the April 9, 2002, grievance.

West Virginia Code § 29-6A-7 clearly and plainly states that a party or the director of the DOP may appeal an administrative law judge's decision. It does not authorize any other person to appeal such a decision, particularly the RTOs mentioned above.

As noted in footnote number one, one of the six RTOs filed pleadings in the Circuit Court of Grant County seeking to enjoin Administrative Law Judge Marteney's rescission of his pay increase. The Grant County court ultimately ruled that Administrative Law Judge Marteney's decision constituted an unlawful taking. While

the Appellants' applaud Mr. Rexrode's good fortune, the Grant County Circuit Court lacked jurisdiction to hear the Appellants' appeal of Administrative Law Judge Marteney's decision.

Further, in our present case, the trial court's reliance on the Grant County proceeding as a basis for *res judicata* was error.

First, Mr. Rexrode was not a party to the April 9, 2002, grievance. Secondly, no part of the grievance occurred in Grant County. Pursuant to West Virginia Code § 29-6A-7(b), the Circuit Court of Grant County could simply not exercise proper jurisdiction of the proceeding or of the parties to the grievance. Consequently, the first prerequisite for application of the *res judicata* doctrine can not be satisfied as a matter of law.

Likewise, the remaining four RTOs who had their pay increases rescinded by Administrative Law Judge Marteney, filed pleadings in the Circuit Court of Kanawha County alleging a violation of due process and an unlawful taking.<sup>2</sup>

Appellants concede that Kanawha County is the proper venue and the Circuit Court of Kanawha County would have jurisdiction; however, these five RTOs were not parties to the April 9, 2002, grievance and like Mr. Rexrode, lacked standing to file any proceeding that would affect Appellants' claims.

2. The two actions must involve either the same parties or persons in privity with those same parties.

As noted above, the parties to the April 9, 2002, grievance were Appellants and the DNR. Assuming arguendo that the civil actions maintained by the RTO's were

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<sup>2</sup> It is interesting to note that all of the RTOs were represented by the same law firm and only Mr. Rexrode's case was filed in Grant County.

proper and the Grant County Circuit Court in Civil Action No. 03-C-68 or the Kanawha County Circuit Court in Civil Action No. 03-AA-181 had jurisdiction to hear Appellants' claims,<sup>3</sup> it is clear that the only common party is the DNR. Not even these two civil actions maintained by the RTOs involved the same parties. Likewise, on its face, there is a complete lack of privity between the parties. See West Virginia Human Rights Comm. V. Esquire Group, supra, in which this Court held that the parental rights and duties of parent to child was insufficient to establish privity of the parties.

3. The cause of action identified for resolution in the subsequent proceeding must be identical to the cause of action in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.

The final element for application of the *res judicata* doctrine concerns the subject matter of the claims. Both the Appellants' April 9, 2002, grievance and their December 11, 2003, Petition for Appeal to the Circuit Court of Kanawha County, involved claims of discrimination and disparate treatment. Appellants' sought, and still are seeking, the have their pay increased to the level of the RTOs with whom they share identical DOP pay grade classifications.

To establish a claim for discriminatory practices (pay rate discrimination) a claimant must demonstrate that he/she is receiving wages at a rate less than the wages paid to another person for equal work on jobs, the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions. Largent v. West Virginia Division of Health, 452 S.E.2d 42, 192 W. Va. 239

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<sup>3</sup> Appellants strongly contend that they were not. While the RTOs certainly had the right to seek an injunction, or T.R.O, their proper course should have been to initiate their own grievance pursuant to the

(1994). This is generally referred to as the "principle of equal pay for equal work." Id. This is the cause of action presented by the Appellants.

By contrast, the cause of action and/or relief prayed for by the RTOs in their two independent civil actions is an unlawful taking of their property without notice and without due process of law. To establish a due process and/or wrongful taking claim, a claimant must prove that he/she has been deprived of a protected liberty or property interest encompassed in the due process clause of the Fourteenth Amendment of the United States Constitution, without notice, without the opportunity to be heard and without the right to counsel. Heston v. Marion County Parks and Recreation Commission, 381 S.E.2d 253, 181 W. Va. 138 (1989). This is the cause of action presented by the RTOs.

These causes of action are facial different, require different evidence to prove and are not dependent each on the other.

In essence, the first is a contract claim and the second is a tort. While pleading in the alternative is permissible, contract and tort claims have almost universally been exclusive of each other and plaintiffs have often had to elect which individual cause and/or remedy to pursue.

In our present case, it appears that the trial court incorrectly assumed that the remedies sought by Appellants and the RTOs were mutually exclusive. This is simply not the case irrespective of the DNR's position below.



Furthermore, for the reasons argued above, the RTO courts in civil actions 03-C-68 and 03-AA-181 lacked jurisdiction of the Appellants such that the DNR could have successfully petitioned those courts to dismiss Appellants' claims therein.

In conclusion, the trial court below incorrectly applied the doctrine of *res judicata* in dismissing the Appellants' civil action because:

a. Neither the Circuit Court of Grant County in Civil Action No. 03-C-68 or the Circuit Court of Kanawha County in Civil Action No. 03-AA-181 had subject matter jurisdiction of the Appellants' claims;

b. The RTOs were not parties to the April 9, 2002, grievance, and were hence, not proper parties to any appeal capable of affecting Appellants' claims pursuant to West Virginia Code § 29-6A-7(b); and

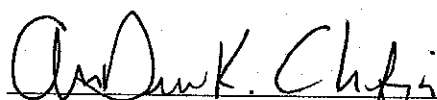
c. The three prong test for application of the doctrine of *res judicata* set for the West Virginia Human Rights Com'n v. Esquire Group, supra, is a matter of law, incapable of being satisfied.

#### VI. PRAYER FOR RELIEF

For all the foregoing reasons, Petitioners/Appellants respectfully request that this Honorable Court reverse the Circuit Court's Order dismissing their claims on the basis of *res judicata*.

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Petitioners,

v.

WEST VIRGINIA DIVISION OF NATURAL  
RESOURCES,


Respondent.

CERTIFICATE OF SERVICE

I, Andrew K. Chafin, counsel for Petitioners, do hereby certify that true and exact  
copies of the foregoing "Brief Of Appellant," was served upon:

Kelley M. Goes  
State of West Virginia  
Office of the Attorney General  
State Capitol Complex  
Building 3, Room 669  
Charleston, West Virginia 25305  
Assistant Attorney General

in an envelope properly stamped, addressed and deposited in the regular course of the  
United States Mail this 13th day of November, 2006.

  
\_\_\_\_\_  
Andrew K. Chafin  
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